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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 121

396 CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. I-VIII) is reported at 264 F.2d 704. The opinion of the District Court (R. 329a-340a [1]) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1959. The petition for a writ

[1] "R." refers to the "Appendix to Appellant's Brief" in the Court of Appeals.

of certiorari was filed on June 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's determination of the fair market rental value of real property temporarily taken by the Government in a condemnation suit is supported by substantial evidence.

STATEMENT

This is a condemnation action instituted by the United States on June 16, 1953 to continue its occupancy of an office building in New York City and to fix just compensation therefor (Pet. App. II; R. 10a). The Government had occupied the building since June 1, 1945, originally as a sub-lessee and since September 29, 1947, as a condemnor (Pet. App. II-III). This case is a continuation of the 1947 condemnation proceeding, in which the fair rental value of the property was fixed by the court pursuant to the stipulation by the parties (Pet. App. III-IV).

Except for the dates of occupancy, the interest taken by the Government in both proceedings was the same (R. 10a-11a, 329a-330a). In the instant case, the Government acquired the right to occupy the building for a year, with the right at its election to remain for additional yearly periods until June 30, 1958 (R. 330a).

By stipulation of the parties, the annual rent for the first three years involved (July 1, 1953 to June 30, 1956) was fixed by the court at $215,000 (86¢ per square foot) (Pet. App. IV). The parties were

unable to agree upon the annual rent for the last two years, however, and that issue was tried before the district court without a jury. After trial, at which there was conflicting expert testimony as to the fair rental value of the building (R. 49a-232a, 240a-299a), the court (Judge Knox) fixed such value at $225,000 annually (90¢ per square foot) (R. 341a).[2] This was $10,000 more than the amount which the parties had stipulated as the fair rental value of the building for each of the preceding three years (Pet. App. IV).

The Court of Appeals for the Second Circuit unanimously affirmed. The court rejected the contention that the award was inadequate because the trial court allegedly "refused to consider the Government's option [to continue its occupancy] * * * in establishing the fair market rental value * * *" (Pet. App. V). It ruled (*ibid.*) that, "[i]n establishing the fair market rental value, Judge Knox, amongst other factors, had the value of the Government's option very much in mind." It pointed out (*ibid.*) that the district court specifically referred to the option; and it held (Pet. App. VI) that it was "very clear that the Trial Judge weighed the disadvantages of the terms of the Government taking—such as the option and its uncertainty as against the advantages in the lease to the landlord." The court, "[a]fter a careful review of the tran-

[2] As the district court noted (R. 338a), the actual cost of the Government's occupancy was about $1.85 per square foot. This was because of the various expenses which the Government assumed in connection with its occupancy (R. 330a-331a).

script, of the prior history and rentals, of the terms of the taking, including the option," held that petitioner "was awarded all that, in all conscience, it was entitled to, under the Constitution" (*ibid.*).

The court further noted (Pet. App. V-VI) that the trial court specifically had provided in its judgment (entered July 22, 1957) that, unless the United States notified petitioner by January 1, 1958 whether it would continue its tenancy beyond June 30, 1958, petitioner "may apply for the fixation of a yearly rental in excess of 90¢ per square foot" (R. 342a); and that on December 23, 1957, the United States notified petitioner that it would continue its occupancy beyond June 30, 1958 (R. 348a). The trial court had stated (R. 340a) that this notice provision was designed to "serve as some compensation to the landlord for the uncertainty with which it is now faced" as to whether the Government would continue its occupancy after that date.

ARGUMENT

The sole issue which petitioner raises (Pet. 2, 4)—whether it was denied just compensation because the district court, in determining the fair market value of the leasehold interest taken by the Government, failed to consider the Government's option to extend its occupancy [3]—is not presented by this case. For,

[3] It is by no means as clear as petitioner assumes (Pet. 8) that the value of the option is a necessary element to be considered in determining just compensation for a temporary taking. "The United States needs no such option, for its inherent condemnation power, by its very nature, is a per-

as the Court of Appeals correctly ruled (Pet. App. V), the district court "had the value of the Government's option very much in mind". As the Court of Appeals noted (Pet. App. V-VI), the district judge in his opinion set forth the terms of the option, pointed out its advantages and disadvantages to petitioner, and "[t]hen, and only then, he reached his decision that 90¢ per square foot—or $225,000—is a fair annual rental". The existence of the option did not constitute "an independent item of damage" (*United States* v. *Westinghouse Co.*, 339 U.S. 261, 263-264); it is significant only "as bearing on the market rental value of the temporary occupancy taken" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 383; *Westinghouse* case, *supra*, p. 264).

The only issue in the case, therefore, is whether there is substantial evidence to support the district court's conclusion that, considering all the facts of the case, 90¢ per square foot is a fair annual rental. The Court of Appeals, after a "careful review of the transcript, of the prior history and rentals, [and] of the terms of the taking, including the option," held that petitioner "was awarded all that, in all conscience, it was entitled to, under the Constitution" (Pet. App. VI). We submit that that holding was correct; and that, in any event, its correctness presents only a factual question not warranting further review by this Court.

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petual option to take, at any time, any property it needs." Mr. Justice Jackson, dissenting, in *United States* v. *Westinghouse Co.*, 339 U.S. 261, 272.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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